

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
JOHN GOELLER and)
MARDELLE GOELLER,) CASE NO. BK83-1719
)
DEBTOR) CH. 11
) Filing No. 360

MEMORANDUM

This memorandum contains finding of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Background

This case began by the filing of a petition for relief under Chapter 11 of the Bankruptcy Code on October 4, 1983. A Chapter 11 plan was eventually confirmed and a final decree was entered and the case closed on April 20, 1988. On April 4, 1991, Nielsen Oil & Propane, Inc., a creditor listed in the Chapter 11 case, filed a motion to reopen the case on the basis that on the petition date in 1983 John Goeller possessed an ownership interest in common stock of P-G Pork, Inc., a Nebraska Corporation, (P-G Pork), and Cornhusker Pork Producers of Nebraska, Inc., a Nebraska Corporation, (Cornhusker Pork), but that John Goeller did not list the stock interest on the original bankruptcy schedules or on later disclosure statements filed with the Court. The motion requests a reopening and requests administration of the common stock listed above as assets of the bankruptcy estate.

Debtors filed a resistance alleging that the reopening and attempted administration of assets is barred by the applicable statute of limitations and denying any fraud which might toll the effect of the statute of limitations.

The issues are: (1) Whether the debtors created a trust more than one year prior to bankruptcy; (2) Whether they conveyed to that trust their interest in the shares in the two corporations prior to the bankruptcy filing; (3) If the debtors did not properly convey their shares to the trust prior to

bankruptcy, did they fraudulently conceal their ownership interest in such shares? (4) If they did fraudulently conceal their interest in such shares, does such fraud toll the statute of limitations of 11 U.S.C. § 549 concerning the avoidance of post-petition transfers?

Facts

1. The debtor, John L. Goeller, did execute an instrument creating the John L. Goeller Trust on July 22, 1982. A copy of the trust instrument was admitted into evidence at Filing No. 45.

2. Exhibit A to the John L. Goeller Trust, Exhibit 45, purported to transfer into the trust from John L. Goeller his interest in 35 shares of stock in Cornhusker Pork and 60 shares of stock in P-G Pork on or about July 22, 1982.

3. Neither the debtor John L. Goeller nor the debtor Mardelle Goeller actually transferred into the John L. Goeller Trust their interest in the corporate stock prior to the bankruptcy filing on October 4, 1983.

4. The debtors did not engage in fraudulent conduct or attempt to conceal their ownership interest in the stock after the bankruptcy.

Discussion

a) Transfer of Shares

The John L. Goeller Trust instrument was executed by John L. Goeller as grantor and David Goeller as trustee on or about July 22, 1982. Exhibit A to the John L. Goeller Trust was executed by John L. Goeller as grantor on or about July 22, 1982. However, there is no evidence that there was an actual transfer of property from John L. Goeller and Mardelle Goeller to David Goeller as trustee on or about July 22, 1982. The stock certificates were signed by John and Mardelle Goeller on the reverse side in the section which deals with sale assignment or transfer of the certificates. That portion of the certificate which should have the name of the transferee is blank on both of the stock certificates which were to be transferred and there is no date on the transfer or assignment portion of those stock certificates. Although there is testimony that it was the intent of John and Mardelle Goeller to transfer the shares to David Goeller as trustee on or about July 22, 1982, there is no written evidence that such transfer actually took place. The stock transfer records do not show the date the stock certificates were

canceled. Instead, at best, they show that John L. Goeller Trust became an owner of a new stock certificate on July 22, 1982.

The bylaws of both corporations require the signature of both the president and secretary to issue a stock certificate. Although the corporate stock transfer record states that a new certificate was issued to the trust on July 22, 1982, the testimony of John Goeller and Robert Sprieck, who were president and secretary respectively of Cornhusker Pork and P-G Pork, is to the effect that at least one of the stock certificates being issued to the trust was not executed by the president and secretary on July 22, 1982, but was, instead, signed by the secretary in 1984.

The debtors did not treat the stock as having been transferred to the trust prior to bankruptcy. They accepted dividend checks from both corporations at various times in 1984 and 1985. The corporations issued tax documents including IRS Form K-1, which lists the ownership interest of a taxpayer and lists his or her dividends or the value of distribution rights. Those K-1 forms were issued to John Goeller for the year ending November 30, 1985, in P-G Pork, and for the year ending September 30, 1985, for Cornhusker Pork. Both documents list the name of the taxpayer, the amount of distribution and the percentage share of ownership. John Goeller received both documents and made no effort to change the corporate records.

Further evidence that the debtors did not treat the stock as having been transferred in July of 1982 is represented by Exhibit 56, a financial statement given by the debtor, John Goeller, to Toy National Bank of Sioux City, Iowa. That financial statement includes a listing for stocks and bonds owned. In that section of the financial statement, the debtor, John Goeller, listed P-G Pork with a value of \$80,000.00 and Cornhusker Pork Producers with a value of \$140,000.00. The interest in the trust was not listed.

The parties have concentrated the presentation of evidence on the issue of the date when the corporations issued shares of stock to the trust. However, even assuming that the issuance was complete upon the signing of the new stock certificates by the president and the secretary, as required by the corporate bylaws, and that that signature was applied after bankruptcy, the Court does not feel that the actual issuance of the new certificates is the significant date with regard to the transfer of the interest of the Goellers to the trust. Instead, it appears that the transfer would be completed upon the endorsement of the shares of stock and the delivery of those shares to the trustee, along with

the execution of the trust document and Exhibit A identifying assets to be transferred to the trust.

Nebraska U.C.C. § 8-309 which deals with investment securities may apply to these shares. That section provides that a transfer of a certificated security, which is what these stock certificates are, does not occur until delivery of the security. If delivery is completed, the transfer of ownership, as between the transferor and the transferee, is completed. Even without an endorsement, delivery, arguably, is effective to complete the transfer as between the transferor and the transferee. U.C.C. § 8-307. Therefore, assuming that Section 8 of the Nebraska Uniform Commercial Code applies to the transactions in question, the transfer to the trust or the trustee would have been effective as between the Goellers and the trustee upon delivery of the endorsed certificates. Such transfer may have been avoidable under some "perfection" theory because the shares were not recorded on the corporate books prior to the bankruptcy being filed, but the transfer would, nonetheless, have been accomplished, subject to potential avoidability.

There is some evidence that the shares were transferred to the trustee on July 22, 1982, following their endorsement. Counsel who prepared the trust documents testified that once the trust agreement and Exhibit A to it were signed plus the stock certificates endorsed, the trustee had a right to take possession. He further testified that he told the trustee that the trustee could take possession, but that the trustee decided to leave all of the paperwork with the lawyer. That testimony is not consistent with the actions of the parties thereafter. The lawyer who prepared the trust documents and who apparently prepared the new stock certificates in the name of the trust, continued to act as if the transfer was not complete until the secretary's signature was applied to the new certificates and the old certificates were canceled. As has been recited above, John Goeller acted for several years as if no transfer had taken place, even after the new share certificates were signed by the secretary.

It seems more logical to conclude that the lawyer, who regularly had possession of the corporate minute books and stock transfer records, held the endorsed certificates until he obtained the secretary's signature in 1984. This theory is consistent with the evidence that the corporation's records did not reflect ownership of shares by the trust and, therefore, issued tax documents in the form of a Form K-1 to John Goeller long after the transfer was supposedly complete. If the transfer had been completed in 1982, it is logical that since the lawyer had an intimate knowledge of the corporate activities, he would

have known that the corporation was a Sub Chapter S corporation and that the record should accurately reflect the ownership of shares by the trust. Not until after the signature of the secretary was applied in 1984 did he tell the corporate tax preparer to change the Form K-1 in the future.

From all of the above, the Court concludes that the transfer of shares from the Goellers to the trust was not accomplished prior to the bankruptcy being filed.

b) Fraud or Concealment

When the debtors created the trust, they sought the assistance of counsel. Counsel drafted the trust document and Exhibit A which listed the assets being transferred to the trust. It was their intention and it was the advice of counsel that the execution of the trust document including Exhibit A, and the signing of the appropriate part of the stock certificates were sufficient actions on their part to transfer their ownership interests. After bankruptcy, when the corporations continued to send dividends to John Goeller, he endorsed the checks, sometimes with the additional endorsement of David Goeller as trustee and sometimes simply with the oral authority of David Goeller as trustee. David testified that it was his position that since the trust provided that John was to receive all of the income from the trust assets, it didn't make any difference whether the checks were payable to the trust or were payable directly to John, because he got the benefit of all of the income.

John Goeller continued to participate in the operations of the two corporations, both as president and, apparently, as a stockholder after the bankruptcy case was filed. The minutes of both corporations reflect stockholders' meetings after October of 1983 in which John Goeller is included as a shareholder. It cannot be determined from the evidence presented whether or not John actually signed a shareholder agreement after bankruptcy, because the shareholder agreements which are referred to in the minutes are not part of the record. The shareholders, or at least some of them, knew of the existence of the trust. Most of the shareholders knew of the bankruptcy filing and Don Nielsen, the owner of Nielsen Oil & Propane, Inc., the creditor bringing this motion, was a shareholder in P-G Pork and participated to some extent in the operation of the business through the shareholder meetings.

Although the actions of John Goeller with regard to his participation as a shareholder in the corporate structure after July 22, 1982, are not consistent with his expressed belief that he had transferred his interest in the corporations to a trust,

such inconsistency does not rise to the level of outright fraud or concealment. His actions were not secret or concealed. The shareholders certainly were aware that he participated in shareholder meetings in some capacity other than as an officer.

The theory of the movant is that the debtors concealed from the Bankruptcy Court and creditors their interest in valuable shares of corporations. However, the debtors have presented evidence that they did everything they could, under advice of counsel, to transfer their interest in the corporate stock to a trust in the summer of 1982. The actual trust document was reviewed by bankruptcy counsel, who was separate from counsel who prepared the trust document, and bankruptcy counsel was satisfied that the listing of the trust on the bankruptcy schedules was sufficient to give all parties notice that there was a trust in which the debtor had a beneficial interest. Nothing was concealed. The debtors attempted to transfer the stock in 1982. They listed the trust on the bankruptcy schedules. Their actions concerning the stock are not completely consistent but such actions were certainly public and nothing was concealed. There is no evidence of fraud.

Any party could have requested a copy of the trust document and Exhibit A to the trust document. That Exhibit A would have shown that at least on July 22, 1982, the debtors had the intent to transfer shares of stock to the trust. If a creditor was further interested, the creditor could have inquired of the corporations whether or not a transfer had actually been accomplished.

Had a creditor investigated, it may have been determined that because the trust was a grantor trust or revocable by John Goeller, and because John Goeller could demand all assets from the trustee, the assets of the trust were part of the bankruptcy estate. It may have been determined that the stock had not been transferred prepetition and, therefore, was property of the estate even if the other trust assets were properly outside the definition of property of the estate.

One of the bank creditors did minimally inquire about the trust. However, no individual creditor inquired and neither did the movant. Don Nielsen, a shareholder in P-G Pork and the owner of the movant, testified that he knew of the John and Mardelle Goeller bankruptcy and, other than having the attorney for movant file a claim, each time he received an envelope from the Bankruptcy Court or anyone else with regard to the Goeller bankruptcy, he threw the envelope in the trash. The reason he did so, according to him, is that prior to bankruptcy or shortly thereafter, John Goeller came to him and promised that the

debtors would pay the obligation to the movant, which was in the amount of several hundred thousand dollars, if the movant would refrain from raising any objections to the bankruptcy proceeding. Based upon his understanding that he would be paid by the Goellers, notwithstanding the terms of the bankruptcy plan, he did not participate in the bankruptcy case. He did not vote on the plan or object to the plan. He could not recall whether he had even seen the plan, but did reiterate his earlier testimony that he threw most of the bankruptcy materials concerning this case into the trash as soon as he received them.

Mr. Nielsen not only refrained from participating in the bankruptcy case, he did not ask John Goeller, at any shareholder meeting or at any other time, how he sheltered the stock from creditors in the bankruptcy. He testified that he simply wasn't interested because he planned on being paid.

This bankruptcy case was begun in 1983 and closed in 1988. Don Nielsen in his capacity as shareholder and in his capacity as officer or owner of the movant, had notice of the bankruptcy from the very beginning, had knowledge of the John Goeller participation in the operation of P-G Pork after bankruptcy, failed to participate in the bankruptcy in any meaningful way, based upon a promise of payment, and did not bring to the attention of this Court any claim of fraud or concealment on the part of the Goellers until sixteen days before the third anniversary of the closing of the case. Now that he has decided to bring the allegations to the Court he has failed to present sufficient evidence of fraud for the Court to reopen the case.

Statute of Limitations on
Avoidance of Post-Petition Transfers

Section 549(d) prohibits action to avoid unauthorized post-petition transfers, such as the stock transfer to the trust, unless such action is brought within two years of the date of transfer or before the case is closed or dismissed. A finding of fraud may toll such limitation, but no such finding is made in this case. The transfer took place in 1984. The case was closed in 1988. The motion to reopen was filed in 1991.

An adversary proceeding to avoid the post-petition transfers would be barred by Section 549. Therefore, the motion to reopen the case to permit such action should be denied.

Conclusion

The motion to reopen is denied. Separate journal entry shall be entered.

DATED: February 17, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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)
JOHN GOELLER and)
MARDELLE GOELLER,)
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DEBTOR(S))
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Plaintiff(s))
vs.)
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)
Defendant(s))
_____)

CASE NO. BK83-1719
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CH. 11
Filing No. 360

JOURNAL ENTRY

DATE: February 17, 1993
HEARING DATE:

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion to Reopen.

APPEARANCES

David Domina, Attorney for debtor
Clarence Mock, Attorney for movant

IT IS ORDERED:

Motion to reopen is denied. See memorandum filed
contemporaneously.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge